

OPEN RECORDS AND MEETINGS OPINION  
2001-O-02

DATE ISSUED: April 5, 2001

ISSUED TO: Gary Thune, Attorney, Bismarck Public School District Board

CITIZEN'S REQUEST FOR OPINION

On March 22, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jack McDonald on behalf of the Bismarck Tribune asking whether the Bismarck Public School District violated N.D.C.C. § 44-04-18 by refusing to disclose information regarding the applicants for the superintendent position until a report listing the finalists for the position is presented to the school district board by an outside personnel firm at the board's regular meeting on April 9, 2001.

FACTS PRESENTED

The Bismarck Public School District Board (Board) has retained an outside personnel firm (firm) to assist the Board in selecting a new superintendent of schools. In an electronic mail message dated February 5, the Tribune notified the firm that it would be requesting a full listing of the applicants for the position once the application process closes. The Tribune indicated it would be making the request under the North Dakota open records law, N.D.C.C. § 44-04-18, as applied to personnel firms by the North Dakota Supreme Court in Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986). The Board has indicated that the advertisement for the position asked that all applications be submitted to the firm and not to the District.

On March 19, the Tribune asked the firm for "the names, current positions and hometowns of all applicants, as well as any other information that's available on the applicants." March 19, 2001, letter from Ken Rogers to Tom Jacobsen et al. In an electronic mail message the next day, the firm responded by stating:

[The firm] does not release the names of applicants to anyone other than our client. Closing for this position is Friday, March 23, 2001. . . . Therefore, we intend to send a list of applicants for the Bismarck superintendent position to the Bismarck Board of Education on Monday, March 26, 2001.

I'm sure if you contact [the Bismarck Public School District, they] will release the names of applicants to you in accordance with the North Dakota FOIA [freedom of information act].

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March 20, 2001, e-mail from Tom Jacobson to Mark Hanson et al.

On March 21, the Tribune sent a letter to the President of the Board requesting that the Board direct the firm to comply with its request under the open records law and the Forum decision. March 21, 2001, letter from Ken Rogers to Jeff Geiger. The same day, the Board held a meeting at which it voted not to release the requested records, and directed its firm not to do so, until its regular meeting on April 9, 2001. In addition, the Board indicated that it did not want to receive the firm's report prior to that date. The next day, March 22, the District notified the Tribune of its decision and the Tribune requested this opinion.

On March 23, this office mailed the District a copy of the opinion request and asked for a response to the request within ten days. On April 2, the District asked for an extension and was given until noon on Wednesday, April 4, to respond in writing to the request.

### ISSUE

Whether it is an unreasonable delay for the Board and the firm to withhold information contained in the applications for the superintendent's position until the firm's report regarding the applicants is presented to the Board at its meeting on April 9, 2001.

### ANALYSIS

It is clearly established, under the definition of "record" as used in N.D.C.C. § 44-04-18 and Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986), that applications for public employment are open to the public, even if in the possession of an agent of the employing public entity rather than the public entity itself. See N.D.C.C. § 44-04-17.1(15) ("record" means "recorded information . . . which is in the possession or custody of a public entity or its agent") (emphasis added); 1998 N.D. Op. Att'y Gen. L-73 (an agent of a public entity is required to respond to an open records request on behalf of the public entity and may not refer the requester to the public entity for a response). This opinion does not involve whether the requested information is open to the public under N.D.C.C. § 44-04-18. In its response to the request for this opinion, the Board agrees that the requested information is an open record. Rather, the question is whether, despite the fact that the requested information is an open record, the Board is allowed to withhold the requested information until its April 9 meeting, 20 days after the Tribune made its request.

Generally, a delay of 20 days in responding to an open records request would be unreasonable. See, e.g., 1998 N.D. Op. Att'y Gen. O-04 at p. O-24 n. 2 ("[r]easonable delays will usually be measured in hours or a few days rather than several days or weeks); 1998 N.D. Op. Att'y Gen. O-03 (a delay of seven working days will be closely reviewed). The Board bases its position on N.D.C.C. § 44-04-18(8), which states:

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It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.

In its response to the request for this opinion, the Board asserts that the "application forms are an integral part of the record that is currently being prepared for presentation to the School Board at its regular meeting on April 9, 2001." Just as the report prepared by the firm may be withheld until the April 9 meeting, the Board asserts the same is true for the applications received by the firm.

It is my opinion that the information submitted to the firm by applicants for the superintendent's position may have been collected by the firm, but cannot be described as "a record that is prepared at the express direction of, and for presentation to" the Board under subsection 8 of N.D.C.C. § 44-04-18. Nor can the completed applications be considered "working papers" under that subsection. See 1998 N.D. Op. Att'y Gen. O-03 (completed application forms for economic development funds are complete in themselves and are not working papers).

The plain meaning of the term "prepare" is "[t]o put together or make by combining various elements or ingredients; to manufacture." The American Heritage Dictionary 978 (2d coll. ed. 1991). Reference to the legislative history of the term "prepare" in N.D.C.C. § 44-04-18(8) is also helpful in defining the term. Subsection 8 was enacted in 1997 as part of Senate Bill 2228. See 1997 N.D. Sess. Laws ch. 381, § 3. The lone reference to N.D.C.C. § 44-04-18(8) in the legislative history of SB 2228 states that subsection 8 authorizes a record to be temporarily withheld from the public "if a governing body asks for a record to be created for its review." Hearing on S.B. 2228 Before the House Comm. on Government and Veterans Affairs 1997 N.D. Leg. (Mar. 13) (Written section-by-section analysis by Office of Attorney General at p. 7) (emphasis added). Based on the plain meaning of "prepare," as well as the legislative history of the term, it is my opinion that the authority to withhold records "prepared" at the direction of a governing body under subsection 8 is limited to records which are originally created at the governing body's request, and does not include records which are collected to create those records.

Interpreting the term "prepared" to apply to reports created at the request of a governing body, but not to records submitted to the person preparing the report, is consistent with

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decisions from the North Dakota Supreme Court and the Office of Attorney General which distinguish between compilations and source documents. See Robot Aided Mfg. Inc. v. Moore, 589 N.W.2d 197 (N.D. 1999) (a specific fee for copies of a compilation does not apply to a request for copies of the source documents used to create the compilation); 1999 N.D. Op. Att'y Gen. L-71 (criminal history records and records of a single conviction). These decisions hold that an open records exception for a compilation of information does not extend to source documents used to prepare the compilation, even if those source documents are an "integral" part of the compilation.

Even if subsection 8 does not apply, the Board argues that a 20-day delay in responding to the Tribune's request is a reasonable delay because it "would allow the Board to obtain legal advice and act upon it without the necessity of scheduling a special or emergency meeting." I disagree. First, it is unclear whether the Board sought its attorney's advice prior to delaying its response to the Tribune's request. Second, "every state official and the employees of any department should know what records are excepted by statutes or case law decisions from the requirements of [the open records] law." 1982 N.D. Op. Att'y Gen. F-23 at p. 67. Providing access to records which are open to the public is a ministerial act which will not require action of a governing body in most cases. A public entity's response to an open records request cannot be automatically extended until the next scheduled meeting of the governing body simply to enable the governing body to give its permission to release the records.

Third, prior Attorney General opinions have held that a public entity may delay responding to an open records request while it seeks its attorney's advice regarding the request, but there are limits to the delay.

As to any record about which there is a reasonable doubt [whether the record is open to the public], a state official and the employees of any department may take the necessary time to determine whether or not an exception exists for the particular record in question. How much time it will take depends upon what is reasonable under the circumstances in each particular case.

1982 N.D. Op. Att'y Gen. F-23 at p. 67. Such a delay is authorized only if "there is a legitimate legal and factual question on what information . . . must be disclosed." 1998 N.D. Op. Att'y Gen. O-03 at p. O-13. In addition, the length of such a delay is limited to the length of time which is reasonably necessary to obtain legal advice. Id.

Once the public entity's attorney is prepared to advise the public entity on its response to the request, further delay is not reasonable. If it is necessary for a governing body to meet to decide how to respond to a request for records, a meeting of the governing body must be scheduled and held. To conclude that receiving advice on how to respond to a request for records can wait until the next meeting of the governing body would allow the governing

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body's meeting schedule to dictate public access to records, which would be particularly troubling for governing bodies that do not have a regular meeting schedule.

CONCLUSION

The Bismarck Public School District violated N.D.C.C. § 44-04-18 by failing to provide the information requested by the Bismarck Tribune within a reasonable time.

STEPS NEEDED TO REMEDY VIOLATION

The Board must immediately release the requested records regarding the applicants for the superintendent's position, or direct the personnel firm to do so.

NOTICE

Failure to disclose the requested records within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem  
Attorney General

Assisted by: James C. Fleming  
Assistant Attorney General

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